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Supreme Court, U.S.
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Cause No. _____

OFFICE OF THE CLERK

In the United States Supreme Court

October Term, 1997

JACKIE SMITH, Individually and on Behalf of All Beneficiaries of BERNARD ALLEN, Deceased, *et al.*,
Petitioner,

versus

AMERICAN ISUZU MOTORS, INC. and ISUZU MOTORS AMERICA, INC.,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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35pp

I. QUESTIONS PRESENTED.

A. In violation of *Daubert*'s established standard for admissibility, the trial court excluded -- on the basis of "authoritativeness" -- the unbiased, probative and persuasive CONSUMER REPORTS' study of Troopers' roll-over propensity, which the opinion below declined to address, instead improperly affirming on the ground that FED. R. EVID. 403 permits exlusion of evidence which might lead to juror confusion -- a ground that the trial court specifically declined to find based upon the difference between the 1995-1996 model year studied and the older Trooper involved in the subject accident.

B. Putative inadmissability under Rule 803(8)(C) should not foreclose admission of probative and persuasive preliminary staff reports under Rule 803(8)(A), when a wide variety of agency investigations lead to finalized factual conclusions by staff, but no final agency action is ever taken on policy, an ultimate safety standard, or similar executive decision.

II. LIST OF INTERESTED PERSONS UNDER SUPREME COURT RULE 29.6

The undersigned counsel of record for Petitioner Jackie Smith certifies that the following list includes the plaintiff-petitioner and all prior counsel in the case and all other persons to have a financial or other potential interest in the outcome of this case based on the information reasonably available to the undersigned. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

A. Interested Parties for Plaintiff-Petitioner:

All claimant parties interested in this appeal are natural persons who were plaintiffs at trial. The

only petitioner is Jackie Smith, mother of the decedent driver.

1. Plaintiff-Appellant-Petitioner:

MS. JACKIE SMITH
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281-397-6702
and on behalf of any other beneficiary of
BERNARD ALLEN, deceased

2. Other Plaintiffs:

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and DAVID GINTER,
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3. Trial attorney for Plaintiffs Glen Ginter, Melinda Ginter, David Ginter, Olivia Mendoza, and Carlos Mendoza, Jr.:

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4. Petitioner's trial attorney at time of judgment:

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6. Replacement appellate attorney for Petitioner:

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---

* Though **MEYER ORLANDO & EVANS$_{PC}$** affords Petitioner's replacement counsel the office and facilities from which this Petition has been prepared and communications with the Court and opposing counsel have occurred, it was incorrectly listed in Appellees-Respondents' Rule 28.2.1 Certificate to the United States Court of Appeals for the Fifth Circuit and West's advance sheet release of the April 2, 1998 opinion. The firm has no involvement in, or interest in the outcome of, this appeal, and is billing the estate of Mr. Curtis Gray Haygood for expenses as a *pro bono* account matter, irrespective of disposition by the Court. Neither the firm nor the above-signed has any financial interest in the outcome of this case.

B. Interested Parties for Defendants-Respondents:

Both Defendants-Respondents named in the caption of this case have the most direct interest in the judgment sought to be reviewed, and each is a corporation.

1. Defendants-Respondents:

AMERICAN ISUZU MOTORS, INC.
ISUZU MOTORS AMERICA, INC.

Despite request to their counsel for a list of parent companies and nonwholly owned subsidiaries, the undersigned has not been provided such information and can make no statement in respect of affiliated entities as required by Supreme Court Rule 29.6. By return facsimile on June 8, 1998, Isuzu's

coordinating North American counsel, Christopher C. Spencer, advised he was "not in a position to cooperate [and could] not provide you with a list of any companies or subsidiaries," because his file on this matter was closed "except for purposes of pushing ahead to obtain very considerable costs that were incurred in this matter." Such lack of courtesy and outright affrontry is brought to the Court's attention to explain the undersigned's lack of full compliance with Rule 29.6, but also to permit the clerk or the Justices to note Attorney Spencer's attitude regarding mandatory disclosure to this Court.

2. Other Defendant not party to this appeal:

ISUZU MOTORS, LTD.[1]✠

3. Trial and appellate attorneys for Defendants-Appellees-Respondents:

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Roberta Mowery Ward, Esq.
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✠ It is unclear from Appellees-Respondents' November 24, 1997 "authorization" for the use of "*et al.*" on the caption of the case in the United Statees Court of Appeals for the Fifth Circuit whether they seek to insert the manufacturer which was never served, back into the appeal. [*See* A-1&2 & n.1] Petitioner does not believe that appeal was perfected with respect to it. Repondents will be referred to collectively herein as "Isuzu."

4. Defendants-Respondents' local appellate counsel:

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Respectfully submitted this 29th day of June, 1998.

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II. TABLE OF CONTENTS

I. Questions Presented i

II. List of Interested Persons . . . . . ii-ix

III. Table of Contents . . . . . x-xii

IV. Table of Authorities . . . . . xiii-xiv

A. Cases . . . . . xiii-xiv
B. Published Material xiv
C. Rules xiv

V. Opinion Below and Relevant Trial Transcripts 2

VI. Jurisdictional Statement 3

VII. Statement of the Case 3-6

VIII. Reasons for Granting the Writ 7-19

A. In violation of ***Daubert***'s established standard for admissibility, the trial court excluded -- on the basis of "authoritativeness" -- the unbiased,

probative and persuasive CONSUMER REPORTS' study of Troopers' roll-over propensity, which the opinion below declined to address, instead improperly affirming on the ground that FED. R. EVID. 403 permits exclusion of evidence which might lead to juror confusion -- a ground that the trial court specifically declined to find based upon the difference between the 1995-1996 model year studied and the older Trooper involved in the subject accident 7-13

B. Putative inadmissability under Rule 803(8)(C) should not foreclose separate admission of probative and persuasive preliminary staff reports under Rule 803(8)(A), when a wide variety of agency investigations lead to finalized factual conclusions by staff, but no final agency action is ever taken on policy, an ultimate safety standard, or similar executive decision 14-19

1. Finality is not a precondition to admissibility 15-16
2. Lack-of-foundation was not a basis for exclusion either 16-19

IX. Conclusion 20

X. Appendices . . . . . A, B, C

A. Opinion Below . . . . . A-1 - A-8

B. Exhibits and Relevant Trial Transcripts on CONSUMER REPORTS . . . B-1 - B-13

C. Relevant Trial Transcripts and Exhibits on NHTSA Preliminary Staff Reports in Response to the Wirth Petition C-1 - C-51

XI. Certificate of Service 21

III. TABLE OF AUTHORITIES

Cases: **Page:**

Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993) . . . . . 8-9 & n.4

Dawsey v. Olin Corp., 782 F.2d 1254 (5th Cir. 1986) 8 n.4

Kraft Gen. Foods, Inc. v. Allied Old English Inc., 831 F.Supp 123 (S.D.N.Y. 1993) 10 n.5

Longoria v. Wilson, 730 F.2d 300 (5th Cir. 1984) 18 n.8

MDU Resources Group v. W.R. Grace & Co., 14 F.3d 1274 (8th Cir. 1994) . . 8 n.3 & 18 n.8

Metallurgical Indus. Inc. v. Fourtek, Inc., 790 F.2d 1195 (5th Cir. 1986) 11 n.6

State of New York v. Kraft Gen. Foods, Inc., 862 F.Supp 1035 (S.D.N.Y. 1994), *judgment entered*, 926 F.Supp. 321 (S.D.N.Y. 1995.). . 9-10 n.5

Wilk v. American Med. Ass'n, 671 F.Supp. 1465 (N.D. Ill. 1987), *aff'd*, 895 F.2d 352, 356 (7th Cir.), *cert. denied sub nom. Wilk v. Joint Com. on Accreditation of Hosp.*, 496 U.S. 927, 110 S. Ct. 2621 (1990) . . . . 10 n. 5

Published Material:

"UNSAFE The complete report on our tests of the Isuzu Trooper and Acura SLX, Why we need safety standards," 61 CONSUMER REPORTS No. 10 at 10 (October 1996) . . . 4 n.1 & 8 n.2

ANNOTATION, *What are Official Records or Books Admissible in Evidence*, 50 A.L.R.2d 1197, supp. § 22 (1995) 17 n.7

Rules:

FED. R. CIV. P. 803(18) 8 n.4

FED. R. CIV. P. 803(8)(A) . . . . . i, 6, 14-19

FED. R. CIV. P. 803(8)(C) . . . . . i, 14-19

FED. R. EVID. 103(a)) 18 n.8

FED. R. EVID. 403 . . . . . i, 11-12

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In the United States Supreme Court

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JACKIE SMITH, Individually and on Behalf of All Beneficiaries of BERNARD ALLEN, Deceased, *et al.*, Petitioner,

versus

AMERICAN ISUZU MOTORS, INC. and ISUZU MOTORS AMERICA, INC., Respondents,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Justices of the Supreme Court of United States:

COMES NOW Plaintiff-Petitioner JACKIE SMITH, Individually and on Behalf of All Beneficiaries of BERNARD ALLEN, Deceased, *et*

al., respectfully requesting a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 2, 1998, on the following grounds:

V. OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at ***Smith v. Isuzu Motors Limited***, 137 F.3d 859 (5th Cir. April 2, 1998) and is reproduced in the appendix hereto, pp. A-1 - A-8 *infra*.

The District Court for the Southern District of Texas issued no written opinion on either issue sought to be reviewed, but the transcript pages relevant to the first issue presented, *i.e.*, the CONSUMER REPORTS article, are reproduced in the appendix hereto, pp. B-12 - B-13 *infra*. The transcript pages relevant to the second issue presented, *i.e.*, the preliminary agency staff reports on the Wirth petition, are reproduced in the appendix hereto, pp. C-1 - C-7 *infra*, with Plaintiff's Exhibits 35-1, 35-3 and 35-6 reproduced, respectively at pp. C-8 - C-10, C-11 - C-36 and C-37 - C-51 *infra*.

VI. JURISDICTION.

Jurisdiction over this petition is conferred by 28 U.S.C. § 1254. This case was appealed to the United States Court of Appeals for the Fifth Circuit pursuant 28 U.S.C. §1291 and a decision was rendered on April 2, 1998. The case was originally filed in the United States District Court for the Southern District of Texas under 28 U.S.C. §1332.

VII. STATEMENT OF THE CASE

Petitioner Jackie Smith's eldest son, Bernard Allen, died in a single-vehicle roll-over accident on July 22, 1994, while driving a 1987 Isuzu Trooper. Individually and on behalf of the beneficiaries of his estate, Petitioner, *inter alia*, brought suit against American Isuzu Motors, Inc., Isuzu Motors America, Inc., and Isuzu Motors Limited (hereinafter collectively "Isuzu"). Smith claimed, *inter alia*, that the Trooper was unreasonably dangerous because it had a propensity to roll over, and that the defendants were negligent. The district court rendered judgment on a take-nothing jury verdict against Petitioner and the other plaintiffs.

Petitioner seeks review of two of the district court's evidentiary rulings, which excluded evidence relating to Isuzu Troopers' roll-over propensity. Consumers Union conducted extensive study of sports-utility vehicles' roll-over propensity, utilizing an established "short-course avoidance maneuver," and published its results.[1] The district court did not refuse to admit the article because of the different year models involved. [B-12&13] The decision below, however, affirmed evidentiary exclusion on grounds presented to the district court, but not addressed by it [A-3&4 & n.2], *i.e.*: Isuzu's weight-of-the-evidence argument that the 1995-1996 model year tested -- and found by Consumers Union to be unsafe -- is irrelevant to any alleged roll-over

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[1] "UNSAFE The complete report on our tests of the Isuzu Trooper and Acura SLX, The rollover risk: Why we need safety standards." 61 CONSUMER REPORTS No. 10 at 10 (October 1996) [B-1 - B-11; PEx. 9-4; RE Tab 6]. The separate component articles of the Special Report where separately headlined: "How the Two SUVs Failed Our Avoidance Test" and "SUV Safety Not Acceptable. Isuzu Trooper/Acura SLX."

propensity of the earlier 1987 model Trooper involved in the subject accident, though later models surely were not less safe.

The trial court also refused to admit into evidence three memoranda prepared by staff members of the National Highway Traffic Safety Administration (the "NHTSA"). [C-8 - C-22] Those memoranda related to a petition filed with the NHTSA in 1986 by then-Representative Timothy E. Wirth (D-Colo.), who had asked as a Congressional subcommittee chair that the agency establish stability standards for certain types of passenger vehicles. This petition was based on the research of Leon Robertson, who served as an expert for Petitioner. Though the NHTSA ultimately rejected the Wirth petition,[2] Petitioner sought to introduce the staff's

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[2] Nothing in the record or in fact supports Isuzu's assertion that internal staff memoranda based upon Petitioner's expert Leon Robertson's work were rejected by NHTSA. NHTSA merely declined to issue a "static stability" standard of 1.2, or to adopt the "track over twice width (T/2H)" approximation of roll-over

preliminary memoranda, in which expert NHTSA members expressed opinions that supported Dr. Robertson's methodology and Petitioner's overall theory of this case. The trial court excluded these memoranda as hearsay, despite Petitioner's argument that these memoranda satisfy Federal Rule of Evidence 803(8)(A), which excepts certain public records from the general rule that hearsay is inadmissible.

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propensity, in response to the Wirth petition. These were policy decisions virtually removed from the NHTSA's technical staff's analysis of the roll-over data and the engineering stability of sports-utility vehicles. Staff evaluation remained strongly behind Dr. Robertson's tests and conclusions. *See particularly* C-42-49; P.Ex. 35-6 §III.C.1 & §IVA ("We therefore concur that the [Wirth] petition has raised and documented, with the Kelly and Robertson report, an important highway safety issue.").

VIII.
REASONS FOR GRANTING THE WRIT

A. In violation of *Daubert*'s established standard for admissibility, the trial court excluded -- on the basis of "authoritativeness" -- the unbiased, probative and persuasive CONSUMER REPORTS' study of Troopers' roll-over propensity, which the opinion below declined to address, instead improperly affirming on the ground that FED. R. EVID. 403 permits exclusion of evidence which might lead to juror confusion -- a ground that the trial court specifically declined to find based upon the difference between the 1995-1996 model year studied and the older Trooper involved in the subject accident

Consumers Union has for generations been an authoritative voice on product safety, however, the trial court excluded its testing of Isuzu Troopers on a "short-course avoidance maneuver" study. The only stated ground for exclusion of the report on this

fundamentally sound test was that the study was reported in a lay publication, that lacked sufficient "authoritativeness."[3] In fact, the trial court did not review or even comment upon the methodology for, verifiability of, and validity of the conclusions from Consumers Union's test. R1445; T601. In failing to weigh the *Daubert*[4] criterion against the study and test methodology, the trial court ignored applicable

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[3] Specifically, an October 1996 CONSUMER REPORTS Special Issue: "UNSAFE The complete report on our tests of the Isuzu Trooper and Acura SLX, The rollover risk: Why we need safety standards." [B-1 - B-11; PEx. 9-4; RE Tab 6] Consumers Union's acknowledged thoroughness raises it above other mass journalistic sources, as is the case for both SCIENCE and POPULAR SCIENCE, either of which have multiple decisions regarding admissibility of particular articles. *See MDU Resources Group v. W.R. Grace & Co.*, 14 F.3d 1274, 1276 n.2 (8th Cir.1994).

[4] *Daubert v. Merrill Dow Pharmaceuticals,* 509 U.S. 579, 593, 113 S.Ct. 2786, 2797 (1993). Rule 803(18) contains no requirement for the types of journals in which "recognized authority" gains circulation.

evidentiary law in preference for an unsupported and unsupportable focus on the publication alone. [B-12&13] In short, CONSUMER REPORTS did not meet the trial court's expectation for academic or scientific publications.

The trial court erroneously adjudged the caliber of the publication, rather than the merits of the study by Consumers Union's professional, unbiased and completely reliable staff.[5] ***Daubert***

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[5] The trial court's was not a very considered evaluation of the journal, but Petitioner submits, merely acceptance of Isuzu's attack. Of course, when Counsumers Union's evaluation is favorable, industry is happy to rely on CONSUMER REPORTS, and have in a wide variety of contexts had the "lay" periodical admitted into evidence. *See, e.g.*, ***State of New York v. Kraft Gen. Foods, Inc.***, 862 F.Supp 1035, 1040 (S.D.N.Y. 1994) (in merger opposed by state, CONSUMER REPORTS introduced to show lack of market effect in switching from cereal manufacturer's established mark to purchaser's mark), *judgment entered*, 926 F.Supp. 321

specifically repudiates Isuzu's and the trial court's approach, focusing instead on the credibility and reproducibility of the study and test results.

(S.D.N.Y. 1995); ***Kraft Gen. Foods, Inc. v. Allied Old English Inc.***, 831 F.Supp 123, 126 (S.D.N.Y. 1993) (which manufacturer has top-rated barbeque sauce established by Consumers Union's rating published in article admitted in expert witness' declaration); ***Wilk v. American Med. Ass'n***, 671 F.Supp. 1465, 1486 (N.D. Ill. 1987) (chiropractors introduce CONSUMER REPORTS article as evidence in antitrust suit against orthopedic and medical doctors' suppression of chiropractic), *aff'd*, 895 F.2d 352, 356 (7th Cir.), *cert. denied sub nom.* ***Wilk v. Joint Com. on Accreditation of Hosp.***, 496 U.S. 927, 110 S. Ct. 2621 (1990). The blank rule applied by the Southern District of Texas in this case, and affirmed by the opinion below, is at odds with consistent admissibility of Consumers Union studies in the Southern District of New York and at least a dozen cases from other jurisdictions were a CONSUMER REPORTS article appears to have been admitted into evidence to prove product market-worthiness or safety.

The appeals court virtually concedes the district court's error by ignoring any reference to the study in question. The decision below affirmed the district court's erroneous evidentiary ruling on grounds "squarely raised" below by Respondents, but not addressed by the trial court, *i.e.*, the difference in year models as grounds for excluding the article.[6] By appellate finding of fact that the model-year difference rendered Consumers Union's study of "neglible" probative worth, the opinion below affirmed exclusion of the article under Federal Rule of Evidence 403. [A-3]

Such switching of exclusionary bases is nothing but an impermissible appellate fact finding. Without elaborating the appellate fact finding on relevancy of 1995-1996 Troopers' instability to an accident involving a 1987 model, the appeals court merely states that the risk of confusing the issues between a 1987 Trooper and tested 1995-1996 models could potentially mislead the jury. The appellate court thus avoided evaluating the

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[6] *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1207 (5th Cir. 1986).

authoritiveness of Consumers Union's "short-course avoidance maneuver" study, as laid out in the article, as had been practiced and subject to peer review since 1988, and as both sides' experts were able to discuss at trial. R1194, 1136-45. The trial court did not rule that the "slight" distinctions in model year were critical (R1150), or made the test on later models irrelevant to the performance standard for a 1987 Trooper. [A-4 n.2 (upholding exclusion on evidentiary ground "squarely raised" by Isuzu)]

Any difference between the test 1995-1996 model Troopers and the subject 1987 vehicle in which Petitioner's son died, was a point for Isuzu to impeach or undermine the applicability of Consumers Union's conclusions. R1201-02;1269-72 (challenging Consumers Union's conclusions about the 1995 Trooper from Petitioner's expert David Lowry's testimony about roll-over trials he conducted with a 1987 Trooper). So long as Petitioner's expert could testify about the validity of Consumers Union's study, he should have been permitted to discuss it and the distinction with the 1987 vehicle. Given the expert's foundation for the Consumers Union study, the article should have been admissible.

Because of the public's high esteem for Consumers Union's work, Isuzu is even less credible in denying the impact of an article confirming tests on the 1987 model. Exclusion of this article was harmful and led to rendition of an erroneous judgment. Because the authoritativeness of Consumers Union's studies on a wide variety of consumer goods is at issue in numerous product-liability suits, the Court should grant review in order to establish that it is the reproducability and peer review of the study, rather than CONSUMER REPORTS as a publication vehicle, that governs admissability. Otherwise, decisions that have admitted such articles when offered by product-liability claimants, or as documented in footnote 5, *supra*, when it has suited industry's purposes, are impugned and other worthy Consumers Union studies may be improperly excluded in future cases.

B. Putative inadmissability under Rule 803(8)(C) should not foreclose separate admission of probative and persuasive preliminary staff reports under Rule 803(8)(A), when a wide variety of agency investigations lead to finalized factual conclusions by staff, but no final agency action is ever taken on policy, an ultimate safety standard, or similar executive decision.

The opinion below erroneously upheld exclusion of preliminary reports of staff members investigating then-Representative Wirth's petition to NHTSA for a stability standard. [A4 - A-7] The trial court's exclusion of the preliminary reports on the Wirth petition as not final agency reports applied a flawed analysis that transcends that court's discretion. Recognizing that Petitioner sought their admission as public records, the opinion below simply concludes admission under Rule 803(8)(A) "would swallow whole Rule 803(8)(C) and its limitations." [A-6]

1. Finality is not a precondition to admissibility.

There is no rule that non-final agency reports are inadmissible *per se*. Numerous preliminary reports, investigational memoranda and other non-final documents that have been admitted under Rule 803(8). Rule 803(8) demands that documents prepared by public officials possess an aura of fairness and accuracy, not that they be final agency determinations.

The subject memoranda [C-8 *ff.*] were independent agency activity in response to Representative Wirth's petition, not mere ongoing investigation in respect to a plaintiff's claim. They contain every indicia of reliability, and to the extent that the NHTSA technical staff's conclusions are assailed by Isuzu, its experts and Petitioners' could have elaborated for the jury the technical details.

The other studies on which Dr. Robertson relied did not utilize the T/2H measure he elaborated and which the NHTSA staff found credible. Petitioner's substantial rights were unquestionably

affected by exclusion of staff support for her expert's opinions while Isuzu simultaneously was permitted to elicit the admission that NHTSA declined to adopt the standard Dr. Robertson and others advocated.

As with Consumers Union's study, the court below excluded the NHTSA memoranda on an impermissible and unsupportable criterion. The trial court failed to utilize the four-factor test of trustworthiness mandated by this Court, and the opinion below ignored admissibility under Rule 803(8)(A) simply by reasserting the Rule 803(8)(C) exceptions. The Rules do not condition admission of public records in the way that agency investigative findings were condition by Rule 803(8)(C)'s exceptions. Accordingly, it was improper to impute to Rule 803(8)(A) the exceptions included in the other subsection -- but deliberately excluded from consideration of entirely "trustworth" public records.

2. Lack-of-foundation was not a basis for exclusion.

The other exclusionary basis implicitly raised by the trial court was that the NHTSA technical

staff's reports "lacked adequate foundation" in Petitioner's expert's testimony. [C-1 - C-7] Public records do not require foundation testimony,[7] but Dr. Robertson could have, and tried to, put into context denial of the Wirth petition. T93-98. The draft evaluation of the Wirth petition discussing Dr. Robertson's work and measures [C-11 *ff.*; PEx. 35-3; RE Tab 8] and Mr. Finkelstein's memorandum challenging the associate administrator on denial of the petition and also discussing application of Dr. Robertson's measures [C-37-C-51; PEx. 35-6; RE Tab 9] both were subject of Dr. Robertson's knowledge, and he could have provided foundation if allowed to testify about "rejection" of his standard. T131.

The cumulative impact of the exclusion of the CONSUMER REPORTS article and the NHTSA memoranda assuredly affected the verdict rendered

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[7] ANNOTATION, *What are Official Records or Books Admissible in Evidence*, 50 A.L.R.2d 1197, supp. § 22 (1995).

and the judgment entered.[8] Petitioner more probably than not, would have received a different verdict and judgment, if the jury had been allowed to consider Consumers Unions' scientific study of Trooper roll-over tendencies on the long-established "short-course avoidance maneuver." With the further testimony by Dr. Robertson that the NHTSA's technical staff had concluded that T/2H was a valid measure of roll-over propensity, there can be no doubt a different result would have attained. Isuzu contends that the exclusion of the NHTSA memoranda was entirely harmless, because Dr. Robertson did testify that "people within the Agency did not agree with" the associate administrator's denial of the Wirth petition. T131.

However, Isuzu managed through a series of erroneous evidentiary rulings to present to the jury all positive public commentary about sport-utility-vehicle safety, but to exclude the corroborating

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[8] *Longoria v. Wilson*, 730 F.2d 300, 304 (5th Cir. 1984) (error in evidentiary ruling in federal civil case as harmless or prejudicial under FEDERAL RULES OF EVIDENCE RULE 103(a)).

evidence that would support Dr. Robertson and Mr. Lowry. This victory was undeserved on the merits of the evidentiary rulings, and more likely than not produced a verdict contrary to what the jury would have rendered had it been allowed to hear of the CONSUMER REPORTS article and the NHTSA memoranda. This is a case of compounded harm through a series of erroneous rulings, especially where the roll-over publicity was the subject of voir-dire interrogation (T22-30) and the NHTSA's ultimate rejection of a stability standard was elicited in cross-examination, without the evidence that the technical staff suggested an outcome contrary to what the political process reached.

The Court should exercise its discretion to review the exclusion of probative and persuasive evidence from Consumers Union and the NHTSA technical staff.

V. CONCLUSION

For the aforementioned reasons, Petitioner JACKIE SMITH, Individually and on Behalf of All Beneficiaries of BERNARD ALLEN, Deceased, *et al.*, requests that the Court issue a writ of certiorari.

Respectfully submitted this thirtieth day of October, 1998 and previously submitted June 29 and August 27, 1998.

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Counsel of record for Petitioner JACKIE SMITH, Individually and on Behalf of All Beneficiaries of BERNARD ALLEN, Deceased, *et al.*

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition have been served by United States mail, postage pre-paid, on twenty-ninth day of June, 1998, August 27, 1998 and again on this _____ day of October, 1998, on the following:

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Richmond, Virginia 23219-4030
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